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DECISION



AMBOSONE  
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GENERAL  
THE COMPTROLLER  
OF THE UNITED STATES  
WASHINGTON, D.C. 20540

FILE: B-189402

DATE: OCT 12 1977

MATTER OF: Reimbursements of total performance or payment  
bond premiums to contractor in first progress  
payment

DIGEST: Reimbursement to Government contractors of the  
total amount of paid performance and payment  
bond premiums in the first progress payment  
can be authorized by amending the relevant  
ASPR and FPR clauses to specifically so pro-  
vide. Such reimbursements are not payments  
for future performance, but are reimbursements  
to the contractor for his costs in providing  
a surety satisfactory to the Government as  
required by law, and therefore, are not  
prohibited by 31 U.S.C. § 529. Prior Com-  
ptroller General decisions clarified.

This decision is in response to an inquiry submitted by  
Robert J. Robertory on behalf of the National Research Council,  
Building Research Advisory Board, Standing Committee on Procurement  
Policy (BRAE Committee), asking whether our Office would object to  
revising the Armed Services Procurement Regulation (ASPR) and the  
Federal Procurement Regulations (FPR) to authorize the consideration  
of paid performance bond and payment bond premiums in computing  
progress payments under Government contracts.

Most of the bonds in question are required pursuant to the  
Miller Act, 40 U.S.C. §§ 270a-270d, which provides, in pertinent  
part:

"(a) Before any contract, exceeding \$2,000  
in amount, for the construction, alteration, or  
repair of any public building or public work of  
the United States is awarded to any person, such  
person shall furnish to the United States the  
following bonds, which shall become binding upon  
the award of the contract to such person, who is  
hereinafter designated as 'contractor':

"(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

"(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. \* \* \*  
40 U.S.C. § 270a.

Requirements for performance and payment bonds in situations not covered by the Miller Act are set forth in the ASPR § 10-104 (32 C.F.R. § 10-104) and the FPR §§ 1-10.104-2 and 1-10.105-2 (41 C.F.R. §§ 1-10.104-2 and 1-10.105-2).

The URAB Committee, which is composed of representatives of federal agencies which do construction, is reviewing on behalf of the Office of Federal Procurement Policy the recommendations of Study Group 13-C of the Commission on Government Procurement: "That the Government pay performance and payment bond premiums to the contractor in his submission of a receipted invoice."

The National Association of Surety Bond Producers and the Associated General Contractors of America support this recommendation on the basis that having to pay an entire bond premium at the time performance and payment bonds are issued, with reimbursement being pro-rated over the life of the contract, creates cash flow hardships for contractors of limited financial means and, because of the cost of money, results in higher contract prices to the Government. Elaborating on this recommendation, Mr. Robert R. Rums, General Counsel of the National Association of Surety Bond Producers, states in a letter to us:

"Surety bond producers are normally required by the terms of their agency contracts with surety companies to make payment of the premium in full within 60 days and, accordingly, they require a contractor to pay the full bond premium within 30 to 45 days after contract award and bond execution, whether or not the premium has been

paid by the owner. In most instances, this requires the contractor to borrow money to pay such premium, and the cost of such borrowing becomes an expense item included in the contractor's bid, thus making the contract price more costly to the owner.

"The general contractor, moreover, has an additional expense in the bids he receives from his subcontractors, unless he pays them the full bond premiums for their subcontractor bonds running in his favor, as the cost of their expense for borrowing to pay bond premiums will be included in their bids to him, and passed on by him in his bid to the owner.

"The bonds required by the Miller Act are non-cancelable, once executed, whether the premium has been paid to the surety or not, or for any other reason.

"A great majority of non-federal contracting authorities, both public and private, have long recognized that performance and payment bond premiums should properly be considered as a mobilization item and, as such, paid in full in the first estimate."

The BRAB Committee also supports the recommendation. However, there is concern, based upon prior decisions of our Office, that a revision of the ASPR and the FPR progress payment clauses to implement the recommendation might be in violation of 31 U.S.C. § 529 (1970), which provides, in pertinent part, as follows:

"No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. \* \* \*

The submission refers to several of our prior decisions which, directly or in effect, disapproved inclusion of the full amount of bond premiums in initial progress payments under contract clauses (similar to the current standard clauses) providing for progress payments based on "material delivered on the site and preparatory work done \* \* \*." 9 Comp. Gen. 18 (1929); B-112376, December 17, 1952; A-39327, November 19, 1931; A-38974, October 15, 1931. The question presented, particularly in regard to 9 Comp. Gen. 18 and B-112376, *supra*, is whether these decisions were based solely on the terms of the contract clauses or whether they reflect the view that full reimbursement for bond premiums at the outset necessarily constitutes an advance payment in violation of 31 U.S.C. § 529.

The former interpretation is correct. The contracts involved in our prior decisions did not specifically provide for reimbursement of bond premiums as such. Rather, the premiums constituted at most a general element in the contractor's price or cost base. We held that payment of bond premiums did not represent "material delivered" or "preparatory work" within the meaning of the progress payment clause. Thus we concluded that bond premiums were recoverable (indirectly) through progress payments only on the basis, and to the extent, of actual contract performance rendered which qualified under the progress payment clause.

Our decision in B-112376, *supra*, is illustrative. That decision stated in relevant part as follows:

"In the present instance, the contractor undoubtedly took the bond premium into consideration in arriving at the unit prices for which he agreed to perform the work, and, hence, as partial payments are made based on the percentage of work completed, as measured by the sum total of the unit prices stipulated to be paid therefor, he is automatically reimbursed for the pro rata part of the bond premium to which he is entitled. By also including the cost of the bond, as such, in the first partial payment voucher in recouping it through deductions on subsequent vouchers in the manner done and proposed, the contractor is, in effect, reimbursed for the entire cost of the bond long before the work has been completed. In other words, the amount of payment is in excess of the amount earned by the contractor under the contract. Thus, the inclusion of the amount representing bond premium, as such, in the payment constitutes an advance of public money, which, in the absence of specific

statutory authority therefor, is prohibited by law. See 31 U.S.C.A., § 529; 1 Comp. Gen. 143."

This decision holds only that a contractor may not be reimbursed under the progress payment clause in excess of the amount of the contract price "earned" by performance which qualifies for progress payments. Since reimbursement for bond premiums was not separately provided for, it could only be recovered, in effect, under the progress payment clause on the same pro rated basis as other general elements in the total unit price. The fact that this decision dealt with a payment involving bond premiums was not the decisive factor. The conclusion would have been the same with respect to any general element in the total unit price.

We agree with the submission that 31 U.S.C. § 529 does not preclude initial reimbursement of the full bond premiums if the contract specifically so provides. As the submission points out:

"\* \* \* the Government receives the full benefit of the performance bond, and the Government together with subcontractors and laborers the full benefit of the payment bond, immediately upon those bonds being furnished. This is because, in the case of the performance bond, if at any time after the award the contractor should fail to perform, the surety is obligated to underwrite complete performance upon demand by the Government, and the bond is irrevocable. In the case of the payment bond, the Government receives benefits from the date of award because the existence of the bond demonstratively broadens competition for subcontractors (with resultant lower prices) and because the Government is relieved from harassment by unpaid subcontractors, suppliers, and laborers. The benefits to the Government from the bonds are as real as work performed or materials acquired."

More fundamentally, if reimbursement for bond premiums is specifically authorized by the contract, no "advance payment" is even involved in their full payment upon submission of a receipted invoice. We have long held that 31 U.S.C. § 529 prohibits the compensation of contractors for services which have not been received, so as to avoid the possibility of Government loss in the event the contractor, after receipt of full payment, should fail to perform his contract obligations. See, e.g., B-180713, April 10, 1974, and cases cited. Where the Government undertakes an obligation in the contract to reimburse the contractor for performance and payment bonds, the contractor earns such reimbursement upon obtaining the

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bonds. In other words, once the bonds have been obtained, the contractor has fully performed his part of the bargain in order to "earn" full reimbursement. There is no further performance for him to render in order to receive reimbursement for the bond premiums.

For the reasons stated above, it is our opinion that 31 U.S.C. § 529 does not preclude the Government from providing in contracts for full reimbursement of bond premiums (where otherwise appropriate) upon presentation of receipted invoices. While not necessarily the only alternative, this could be accomplished by amending the standard progress payment clauses. We note in this regard that the applicable statutes place no limitation on how the progress payments are to be computed, other than that they can not exceed the unpaid portion of the contract price. See 10 U.S.C. § 2307 (1970) and 41 U.S.C. § 255 (1970).

PAUL G. Derbling

Acting Comptroller General  
of the United States